IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BOLAND,
Plaintiff in Error,

vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant in Error.

No. ~~1705~~ 2169

Brief of Defendant in Error

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ADDITIONAL STATEMENT OF FACTS.

The statement of facts in the brief of the plaintiff in error is a fair statement of the allegations of the plaintiff's complaint, but it evidently does not purport to be, and certainly is not, a statement of the admitted or undisputed facts in the case.

The plaintiff's allegations, in brief, are that while working as a section laborer for the defendant railway company, the defendant furnished to the

plaintiff a hammer and a defective cold chisel, and that while using them in the proper manner a chip flew from the head of the chisel and put out the plaintiff's eye.

The defendant's admissions in brief are that the plaintiff was working for the defendant upon the occasion in question, and that he was using a hammer and a cold chisel and that the defendant had furnished him the hammer. But it was denied that the defendant had furnished the chisel or that it was necessary or proper for the plaintiff to use that chisel or any chisel in his work.

The allegations and the admissions and denials above referred to are in the pleadings. Coming now to the evidence, the wrong complained of was that one employe of defendant handed another employe a defective chisel and told him to use it. In order to bind the defendant company by this action, plaintiff offered evidence that the employe who had furnished the tool was called a section foreman and that he had power to hire and discharge men.

The defendant had denied that the employe referred to had furnished the chisel, and if he did furnish it, denied that he had authority to do so. The defendant had sought to show by cross-examina-

tion of plaintiff and his witnesses that the chisel had been procured from an abandoned donkey engine on some adjoining property, and either that the plaintiff had procured it himself or had seen the section foreman go over there and get it. Defendant further offered evidence that no section foreman had authority to procure a tool in any such way as that and sought to show that the plaintiff was the son of the section foreman; that he had himself run the section in his father's absence and that he knew of this limitation upon the foreman's authority as indicated by custom and precedent in the past with which he was perfectly familiar.

ISSUES BEFORE THIS COURT.

After the trial was over and the verdict and judgment had been rendered, it seems to have occurred to plaintiff to question the sufficiency of our proof of the limitations of the foreman's authority, or of the plaintiff's knowledge of such limitations, and the idea seems to have occurred to him that we had shown or admitted a real or apparent authority in the section foreman to furnish this particular tool. He seems to have conceived the idea that there was no question for the jury regarding the extent of the foreman's authority.

That this was entirely an afterthought on counsel's part, however, is indicated by the fact that he did not ask the court to strike out the testimony on this subject, did not ask the court to withdraw that issue from the jury, and took no exception to the instructions of the court by which the issue was left to the jury.

It would seem, therefore, that he was precluded from questioning in this court the views of the trial court upon the law of master and servant, or of express or implied authority and limitations thereon. However, in searching the record, counsel seems to have discovered that certain questions were asked bearing upon the subject of the express or apparent authority of the section foreman, and that these questions had been objected to by counsel as immaterial, and the objections overruled, and the idea occurred to counsel that he could use these rulings as a basis upon which to present to this court questions of substantive law which he desired to raise.

It seems so clear to our minds that the questions which counsel seek to present in their brief are not raised by this record, that we shall not attempt to discuss the substantive law which should govern the instructions of the court in a case of this sort. The

only questions raised here are whether at the time certain questions were asked, the record was such that the court should have ruled that any answer to them would be necessarily immaterial and should therefore have sustained counsel's objections to the questions. There is no issue here as to whether the answers to these questions were, or might have seemed, material at the time, for there were no motions to strike the answers. There is no question here as to whether answers which might have seemed material at the time, proved later to be immaterial by reason of our failure to connect them up with the case, for there was no motion at the end to strike such evidence and no request for an instruction that the jury should disregard it. We repeat that the only questions raised are whether the court at the time the questions were asked could, from the state of the record at that time, say that any answers to the questions would necessarily be immaterial.

ARGUMENT.

The first matter to be considered, therefore, is the state of the record at the time the objections were made, first, as disclosed by the pleadings, and second, as shown by the evidence up to that time.

We consider, first, the issues as framed by the pleadings. It is alleged in paragraph IV of the complaint (Record p. 4) that it was necessary for plaintitff to use a cold chisel, and that the cold chisel and other tools are furnished and kept in repair by the defendant. It is admitted in the answer, paragraph IV (Record p. 8), that the plaintiff was using a cold chisel and hammer and that defendant furnished the hammer, but every other allegation in paragraph IV, including the allegation that defendant furnished the chisel, is denied. It is alleged in paragraph V of the complaint (Record p. 4) and in paragraph VII (Record p. 5) that it was the duty of the defendant to furnish plaintiff with suitable cold chisels, and that it was necessary and proper for plaintiff to use a cold chisel. It is denied in paragraph VI of the answer (Record p. 8) that it was necessary or proper for plaintiff to use any chisel whatever, and also denied, under the

general denial of paragraph IV of the answer, that it was the duty of the defendant to furnish any chisel. It is alleged in paragraph VI of the complaint that the defendant furnished the chisel in question (Record p. 5). This is denied in paragraph V of the answer (Record p. 8).

It is further pleaded as an affirmative defense in the answer (Record pp. 9 and 10) that the risks and dangers were known to and assumed by plaintiff at and prior to the time of his injuries.

It will be observed that there was no allegation in the complaint, and therefore no specific denial in the answer, that the particular employe, named Patrick Boland, and called section foreman, had handed the chisel in question to the plaintiff. When this question arose, upon the hearing, the following occurred:

"THE COURT: Do you deny that the foreman furnished the tool in this case? That the foreman handed it to the plaintiff?

"MR. DORETY: Well, we put them at issue on that; we put them to proof of it." (Record p. 23.)

There are many lines of evidence which might be properly offered by the defendant under the issues framed as above. The defendant would clearly be entitled to show, for example, that the plaintiff

had procured this tool of his own motion from some source unknown to the defendant, and that there was no emergency from which any authority to procure a tool in that way could be implied. It is elementary that there is no ground upon which an employer can be held liable where the servant was injured while using for the purposes of his work some material substance which happened to be in a convenient position, but which was not the property of the employer and which was not used by his authority.

LaBatt on Master and Servant, Section 168.

Channon vs. Sanford Co., 70 Conn. 573, 40 Atl. 462, 41 L. R. A. 200.

Yearsley vs. Sunset Telephone & Telegraph Co., 110 Cal. 236, 42 Pac. 638.

We would be equally entitled to show that the chisel had been handed to the plaintiff by some fellow employe, but that the latter was not authorized to furnish tools, and that the furnishing of this chisel was not within the scope of his authority.

LaBatt on Master and Servant, Vol. 2, p. 1659.

12 *Am. & Eng. Enc. of L.* 952.

26 *Cyc.,* p. 1329.

McGee vs. Cuyler (Maryland), 75 Atl. 970.

Even though the employe who furnished the tool is a foreman, in charge of the job, it does not necessarily follow that he has authority to furnish tools or materials, and it is proper to show that such an act is beyond his authority.

Choctaw Electric Co. vs. Clark (Okla.), 114 Pac. 730.

Telander vs. Sunlin, 44 Fed. 564.

And finally it has been held that in a case almost identical with the facts of the present case, not only that the limitations in this respect upon the foreman's authority may be shown, but that upon facts similar to the facts in this record, the court should have directed a verdict in favor of the defendant. In the case referred to, an apparatus had been made by a foreman on the job, who employed his own men and superintended the job on which he was working. As in the case at bar, tools were furnished through a superior officer to the foreman and the men. The apparatus in question was then adopted by another foreman having similar rank, and used by him contrary to the express orders of the superior. It was not shown that the men under him had any knowledge of these orders, but the court held that the evidence failed to show that the apparatus in question was furnished by the

master, and directed a verdict for the defendant.

Callaway vs. Allen (C. C. A., 7th Cir.), 64 Fed. 297.

Under these decisions we would clearly be entitled to show that the employe who handed the chisel to plaintiff, although a foreman having certain duties with respect to tools, was expressly limited in that authority, and was not authorized to procure a tool in the manner shown here, and that this limitation of authority was known to plaintiff. In brief, the defendant was entitled, under the issues made by the pleadings, to introduce evidence tending to show that the instrumentality which caused the plaintiff's injury was one not furnished by defendant or under its authority; that it did not belong to defendant, and that it was adopted for use by the plaintiff with full knowledge of these facts.

In considering the questions against which objections were overruled at the trial, it was the right and duty of the court to consider whether any answer which might be given responsive to the question could materially tend to support any one or more of the facts upon which the defense might rest as above stated. At the time the objections were presented and rulings made, the court could not

know what answer would be given, nor could it anticipate the respective answers which were given. Whether the answers which were given were in fact material is not the question which was presented to the trial court, for the record shows no motion to strike, and it is elementary that immateriality in an answer cannot be urged as error where the question ruled upon was proper, and might call forth a material answer. In order to take advantage of an objection to the question under such circumstances, the party must follow it up with a motion to strike the immaterial answer.

Gould vs. Day, 94 U. S. 405, 24 L. Ed. 232.

N. P. Ry. Co. vs. Charles, 51 Fed. 562, at 571.

Union Ins. Co. vs. Hall, 90 Minn. 252, 95 N. W. 1112.

Chicago City Ry. Co. vs. O'Donnell, 114 Ill. App. 359.

Western Union Tel. Co. vs. Bowman, 141 Ala. 175, 37 Southern 493.

Moreover, it is not error to admit testimony which at the end of the case turns out to be immaterial by reason of some failure to connect it up, or to furnish some necessary link in the chain. When such evidence has been admitted by the court over objection, upon the assumption that it may be later

connected up, and become material, and the party offering the evidence later fails to furnish the necessary connection, the objecting party cannot rely upon the objection originally made, but must make a motion at the end of the case to strike out the immaterial evidence, or ask the court to instruct the jury to disregard the same. The attention of the court must be called at the end of the case to the fact that the evidence offered has become immaterial.

Walker vs. Lee, 51 Fla. 360, 40 Southern 881.

Wilson vs. Johnson, 51 Fla. 370, 41 Southern 395.

Hady vs. Brown, 151 Ind. 75, 49 N. E. 805.

We are now prepared to place ourselves in the position of the trial court at the time of the rulings, as to the issues framed by the pleadings, and as to the possible lines of testimony by which our contentions might have been supported. In order to understand the point of view of the trial court completely, however, it must be borne in mind that all of the direct witnesses to this accident were hostile witnesses, the plaintiff himself, the man working with him, who had left our employment and was produced as a witness by the plaintiff, and the section foreman, who had also left our employment and

was the step-father of the plaintiff. We were necessarily groping somewhat in the dark. We could show by our own witnesses the actual authority of the section foreman, the express limitations upon his authority, and the scope of his duties, but to show the plaintiff's knowledge of these limitations, and the plaintiff's knowledge of the source from which the chisel had come, and the source from which it in fact came, we had to depend upon the hostile witnesses above named, one of whom, Patrick Boland himself, was not produced until the plaintiff's rebuttal, and after the court had made most of the rulings criticized here. We had already sought, on cross-examination of the plaintiff and his witnesses, to show that the plaintiff had either procured the chisel himself, or had seen the section foreman go over and get it (Record pp. 17, 19), and that his past experience had been such as to make him familiar with the scope of the restriction upon the authority of the section foreman (Record p. 17). The scope of our denials was very broad and the particular line to be presented was somewhat indefinite. Under these circumstances and with the issues in this condition, the rulings criticized here were made, and it now becomes necessary to examine those rulings more closely.

THE ASSIGNMENTS OF ERROR.

The assignments of error are not numbered, nor separately stated, but a considerable amount of testimony, including a number of different questions and answers, and a number of different objections and rulings of the court, are grouped together as assignment No. 1, so that it is somewhat difficult to separate them and to discuss them intelligently. However, we shall attempt to take up the questions or statements of evidence which were objected to, one by one, and to state briefly the theory upon which the evidence was offered. We can then proceed to discuss the propriety of the court's various rulings with more clearness.

The first question objected to (Record p. 22) is as to whether the Great Northern ever furnished the sort of a chisel that plaintiff claimed to have been injured by. We had denied that either the Great Northern or any of its employes ever furnished that particular tool. It was surely proper to show that in the ordinary course of events neither the Great Northern nor any of its employes had any such tools to furnish, as tending to show that the section foreman had not furnished this one. It

would have been proper to show that such a tool had not been invented or manufactured at that time, or that there was no such tool in the county and that therefore the statement that the foreman had furnished that particular tool to plaintiff must be untrue. On the same reasoning our proof that neither the Great Northern nor any of its employes were in possession of such tools was proper, it being not yet developed that the foreman claimed that he had obtained the tool from an outside source.

The next question is, "Does the section foreman have authority to go and buy a tool and charge it to the company?" (Record p. 23). As it later turned out, no claim was made that the section foreman had bought this tool, so that for this reason the question would become immaterial, except as tending to fix one of the limits of the section foreman's authority. The question would have been material, however, if followed up by a showing that the section foreman had in fact bought the tool, so that the court's ruling at the time was correct. Moreover, inasmuch as no issue developed as to whether the tool had been purchased or not, the error, if any, was not prejudicial.

The next question is, "Does the section foreman of the Great Northern have authority to obtain

tools in any way except from the supply train by requisition?'' This question was proper as determining the express limits of the section foreman's authority. We had made no admissions as to what a section foreman was, nor what his authorities were. The witness who was being questioned had stated that he made requisitions for tools and got them from the supply car, but that would not prevent our showing that he had no authority regarding tools, and perhaps showing by some other witness that, as a matter of fact, he did not even have authority to get them from the supply train. The question of what sort of an employe a section foreman was, what his duties were, and what authority he had, if any, and in what respects he represented the employer, were still open under the pleadings. For all that the court or jury knew, or for all that any admissions on our part had established, the section foreman might be simply a bookkeeper, a labor agent, or a messenger boy employed to carry tools from the tool car to the section handcar, it being testified to by the plaintiff simply that a man named the section foreman had given him a tool. It is surely proper for us to show who and what a section foreman is and what his authority is, and even if we had, at this time, admitted that he was

in charge of the work and furnished the tools, it was still open to us to show an express limitation upon his authority, and to follow that with proof that the plaintiff knew of the express limitation and knew that it was being violated when the section foreman handed him the chisel in question. We did not know ourselves at this time, and certainly the court could not know how much proof we might be able to get from the hostile witnesses on this point.

The above objections are directed against the evidence of witness John Craig. Assignment of errors No. 1, however, setting up the above objections, then proceeds to set forth a paragraph of testimony and three questions and answers of the witness P. H. McFadden. The paragraph sets forth the system by which tools are furnished by the Great Northern, and shows, briefly, what the section foreman has to do with the matter. Neither side had yet been committed to the position that the section foreman had secured the chisel from an outside source, and the allegation of the plaintiff was simply that the defendant company had furnished it through its agent. For all that the court knew, or for all that we could tell ourselves at that time, it might develop from the testimony of the section

foreman that the chisel had come from the regular tool supply of the company. Under these circumstances the company would not be an insurer of the tool, but we would be held simply to its reasonable selection and maintenance and to a reasonably frequent inspection, and it was proper to anticipate such proof by showing what the system used by the Great Northern Railway Company was. It does not appear from the record what questions were asked in order to bring forth this testimony, and therefore it cannot be determined here exactly what the rulings of the court were. Presumably the information was in answer to a question of what the authority and duties of the section foreman were as to tools, and such a question would be proper under the issues here.

The next objection refers to the question, "Is there any authority in any of the section foremen, under the rules of the company, or did Pat Boland have any authority, in the month of August, 1909, to procure tools in any other way?" (Record p. 25.)

This is practically the same question that was asked of the witness Craig, and it has already been discussed.

The next question is, "Would you consider the necessity of that (putting in a guard rail) to be an emergency calling for the procuring of a tool in some way, if no suitable tool were on hand?" It might be contended that the circumstances related by the plaintiff had shown such an emergency as might create an implied authority in an employe in charge of the work to procure tools to meet the emergency in other than the usual manner, and the answer which was given would be material in rebutting this assumption. If it be argued that no such contention or assumption was in fact made, it would follow that the error, if any, was therefore not prejudicial.

The next question is "will you state whether or not the section foremen are required to make any inspection of the tools or report the condition of the tools, or anything of that sort?" (Record p. 26). There being an issue in the case as to whether the section foreman had authority to furnish the cold chisel in question, any evidence tending to show what sort of an employe he was, what his duties were and what, if anything, he had to do with tools would be material. For all that the court would know at this time, the question might have been followed up by a showing that this duty of inspection

devolved upon another employe, or that perhaps the plaintiff himself should have made it. The question might have been connected up with the case and have become material in a number of different ways. and it was not for the court to say that no answer which might be given to that question could possibly become material under any theory. If at the close of the case the plaintiff found that the answer was not material, or had not been properly connected up, he should have called the attention of the court to the matter at that time by a motion to strike. He cannot contend now that the ruling upon the question made at the time was improper.

Next comes a paragraph, not stated in the form of question and answer, to the effect that cold chisels of the sort which the plaintiff was using are not furnished to sectionmen of the Great Northern Railway Company, but that regular track chisels of a different character are furnished. (Record p. 27.) This is practically the information given in answer to the first question objected to, and has already been discussed, tending to show that the chisel could not have been furnished by a Great Northern section foreman as the plaintiff claimed.

Finally, and still under assignment of error No. 1, is a series of five questions put to the witness

Patrick Boland, who, as the record shows, was the step father of the plaintiff, and no longer in the service of the defendant, and who had first been called as a witness by the plaintiff himself, and was therefore presumably in the nature of a hostile witness.

The first question is as to where the chisel the plaintiff was using came from. It having been denied that the defendant had furnished it to him, it was surely proper to ask any witness where it came from. The plaintiff might have borrowed it or purchased it himself.

The witness having answered that he himself had given the chisel to the plaintiff, the next questions are as to where he had gotten it and whether it was a Great Northern chisel. (Record p. 28.) These questions were proper for two reasons. In the first place it having been denied by us that Patrick Boland had handed the chisel to the plaintiff, and he being a hostile witness, it was proper for us to cross-examine him as to his statement that he had handed the chisel to the witness, by making him admit that this was not a Great Northern chisel, and that he had proper chisels on hand which were furnished by the Great Northern; this fact tending to establish the improbability that he had handed the

chisel to the plaintiff as stated. In the second place, it having been established that the sort of employe called a section foreman had nothing to do with tools, except to make requisitions for them, and that aside from that, he had no more right to go out and procure a tool for another employe than a ticket agent or a brakeman would have, it was proper to show that the tool in question had not been procured by him in any way that would bring it within the scope of his authority, and finally, the evidence given by this witness might yet be followed up by a showing that the plaintiff knew how the foreman had procured the chisel and knew that he was not acting within his authority in doing so, and that his act was not the act of the defendant. If it be assumed that this last showing was necessary to connect up the testimony to make it material, the fact remains that it was proper to allow the questions asked as one of the necessary links in the chain. If they were not properly connected up afterwards, it was the duty of plaintiff to call the matter to the court's attention, and ask that this evidence be stricken or the jury instructed to disregard it.

The above is a statement of the various alleged errors which have been collected by plaintiff in his assignment No. 1. Assignment No. 2 is simply

directed to the ruling of the court in refusing a new trial, and the correctness of this ruling depends entirely upon whether any errors had been shown under assignment No. 1; consequently the discussion already set forth covers both assignments.

The argument of the plaintiff in error seems to assume that it was admitted by us, or established by him, in such a way that the court would take judicial notice of it, or that it would not be disputed, that a section foreman was a man employed to represent the company in furnishing tools, and that he furnished the tools in question, and that this act was necessarily the act of the company, and that therefore it was immaterial where he got the chisel since it was the defendant acting through him that furnished it. He argues that therefore we cannot invoke the fellow servant rule since the duty on the part of the master to see that the tools which we furnish are safe cannot be delegated, or in other words, that any one employed to furnish tools is necessarily a vice-principal.

The authorities cited by him support this contention, and we agree with him in every particular. The trouble with this argument is, that it first sets up a man of straw and then bravely knocks it down. It completely demolishes the theory which it at-

tacks, but unfortunately for the plaintiff that is not the theory upon which the evidence was admitted. We did not invoke the fellow servant rule in any way. We did not claim that this was the act of a co-employe or of any employe. What we were entitled to claim under the issues, and entitled to try to prove was that the man who went and got that chisel was not employed for that purpose any more than a stranger or a rate clerk or an employment agent would be, and that in getting the chisel he was doing something he was not hired to do, and had no authority to do.

Here is the fallacy in the plaintiff's argument when applied to the admission of evidence. He assumes that we had admitted, or that the court must take judicial notice that Patrick Boland was in charge of the work and had power to employ or discharge men and to furnish all tools, and that therefore the only material issue in this case was as to whether he had actually handed to plaintiff the particular tool in question. The truth is that we had not only not admitted these things, but we had denied them, as we have already shown by reference to the pleadings.

As already pointed out the record raises no question as to the correctness of the court's instruc-

tions. It raises no question as to whether any of the answers given were immaterial, for there was no motion to strike an answer. It raises no question as to whether any of the questions asked, afterwards became immaterial by reason of our failure to connect them up with other necessary links in the chain, for the question was not called to the attention of the court at the close of the case, and there was no motion to strike. The sole and only questions presented to the trial court were whether or not the questions objected to might fairly be expected to call forth any material testimony. If so, the objections to the questions were properly overruled and objections to the answers could only be raised by motions which were not made.

The questions of substantive law discussed in the plaintiff's brief are therefore not pertinent to this record, and there is no showing of error on the part of the trial court.

Respectfully submitted,

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